

FROM : DeltaKeeper

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Baykeeper's Deltakeeper Chapter  
California Sportfishing Protection Alliance  
Watershed Enforcers

20 August 2005

Mr. Robert Schneider, Chair  
Mr. Thomas R. Pinkos, Executive Officer  
Mr. Kenneth D. Landau, Assistant Executive Officer  
Mr. Dave C. Carlson, NPDES Program Manager  
Mr. Richard McHenry, Senior Engineer  
Regional Water Quality Control Board  
Central Valley Region  
11020 Sun Center, No. 200  
Rancho Cordova, CA 95670-6144

Via Facsimile: Hardcopy to Follow

Re: Tentative Revised Waste Discharge Requirements and NPDES Permit and Revised  
Cease and Desist Order for City of Woodland Wastewater Treatment Plant Yolo  
County

Dear Messrs. Schneider, Pinkos Landau, Carlson and McHenry:

On behalf of Baykeeper's Deltakeeper Chapter, the California Sportfishing Protection Alliance and Watershed Enforcers (hereinafter Deltakeeper), thank you for this opportunity to comment on the tentative revised NPDES Permit and Cease & Desist Order (Revised Order) for the Woodland wastewater treatment facility (Discharger). We appreciate the quandary faced by the Central Valley Regional Water Quality Control Board (Regional Board) staff. Both the State Water Resources Control Board (State Board) and the Alameda Superior Court have directed the Regional Board to ignore federal regulations in revising the permit. We believe prudence would suggest that the Regional Board adopt a legally defensible permit, in accordance with applicable regulations, and then explain its rationale to the State Board and Superior Court.

Our principle concerns are; 1) the elimination of effluent limits for beryllium, bis(2-ethylhexyl)phthalate and organochlorine pesticides; 2) the absence of ammonia limits protective of warmwater and coldwater species present in Tule Canal and 3) the lack of EC limits to protect irrigated agriculture.

**1. The Order Must Include Limits for Beryllium, Bis(2-ethylhexyl)phthalate and Organochlorine Pesticides**

An Alameda Superior Court Judge has ordered the Regional Board to remove effluent limitations for beryllium, bis(2-ethylhexyl)phthalate and organochlorine pesticides. The Court's order is apparently based upon a conclusion that the subject

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constituents were not detected during a three (3) year period. However, as we explain below, the order contravenes the federal Clean Water Act (CWA) and applicable regulations. Removal of these three effluent limitations would constitute "backsliding," there is no legal basis for the 3-year time period cited by the Court and, contrary to the Court's opinion, the constituents have been documented in the Discharger's effluent within the last three years.

Federal regulations at 40 CFR 122.44(1)(2) explicitly state:

"In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the Clean Water Act, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under Section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

All of the 3 cited effluent limitations were included in the old NPDES permit (Order R5-1998-0021) that was issued in 1998. They were also included in the renewed permit (Order No. R5-2003-0031) issued in 2003. Indeed, the Findings in the proposed Revised Order establish that the three constituents have a "reasonable potential" to violate water quality standards.

The Revised Order's Finding for these three constituents cites Federal Regulation 40 CFR 122.44(1)(2)(i)(B)(1) in claiming that removal of the effluent limitation does not constitute backsliding. However, 40 CFR 122.44(1)(2)(i)(B)(1), which establishes the exceptions to backsliding, states:

"Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance."

The Findings in the Revised Order fail to provide any support for an "exception" to backsliding. They do not provide any new information, which was not available at the time of permit issuance. There has been no "material and substantial alterations or additions to the permitted facility" which would justify a less stringent effluent limitation (40 CFR 122.44(1)(2)(i)(D)). There has also been no change in the character of the community, such as closure of an industry, which would eliminate the pollutants from the influent wastestream. The industries or ambient sources which could be the source of beryllium and bis(2-ethylhexyl)phthalate are still present.

Instead, the Findings merely cite the Court Order directing the removal of the subject three effluent limitations on the basis that the constituents were not detected during a three (3) year period. As we have previously pointed out, there is no basis in law or the applicable regulations for the 3-year time period cited by the Court. The old NPDES permit (Order R5-1998-0021); the renewed permit (Order No. R5-2003-0031),



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and the Proposed Order's findings for these 3 constituents establish that there is reasonable potential to exceed water quality standards. Consequently, Effluent Limitations are mandated under 40 CFR 122.44(d).

Even if the Court's order had some statutory or regulatory basis in prescribing a three-year "non-detection" period as the basis for Effluent Limitations, subsequent facts mandate that effluent limits be included in the Revised Order. According to the Discharger's Self-Monitoring Reports:

1. Alpha BHC, an OC Pesticide, was detected at 0.027 ug/l in November 2004
2. 4,4 TDE/DDD, an OC Pesticide, was detected at 0.05 ug/l in January 2003 and
3. bis(2-ethylhexyl)phthalate was detected at 4.1 ug/l in March 2003.

The Revised Order as currently written is in violation of the Federal Regulations and, as discussed above, must be revised to include the subject Effluent Limitations.

**2. Ammonia Effluent Limits Protective of Warmwater and Coldwater Species Must be Included in the Revised Order**

The Revised Order also incorporates permit modifications made by the State Board in WQO 2004-0010. Those modifications revised Regional Board Order No. R5-2003-0031 to provide that ammonia limits will apply only between 1 October and 31 May. This change was made in response to Discharger claims that salmonids are not present during the summer. Unfortunately, in modifying the ammonia limits for coldwater species, the State Board inadvertently eliminated ammonia limits protective of warmwater species identified as being present during warm weather.

First, the State did not remand R5-2003-0031 to the Regional Board but promulgated the changes as WQO 2004-0010. In issuing WQO 2004-0010, the State Board failed to conduct a reasonable potential analysis as required at 40 CFR 122.44; failed to prepare a Fact Sheet as required at 40 CFR 124.6; failed to provide adequate notice as required by 40 CFR 124.10 and failed to provide a written response to significant comments as required by 40 CFR 124.17 (a)(2). Had legally required procedures been followed, it is unlikely that the ammonia limits would have been modified. Indeed, discussions with State Board members following the hearing revealed that they were unaware that they had eliminated ammonia limits pertaining to warmwater species. Personal communication with State Board Member Gary Carlton.

Second, and more importantly, subsequent new information has come to light that justifies the reopening of the permit. Permits may be modified as new information becomes available. 40 CFR 122.62(a)(2). As previously mentioned, justification for seasonal ammonia limits was based upon the mistaken belief that salmonids are only seasonally in the system. However, the Revised Order's Information Sheet (Page 2) provides new information to the contrary. The *Habitat Improvement for Native Fish in*

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the Yolo Bypass, states, "considering the four runs of salmon present, adult migration may occur in any month." This indicates that salmonids are present in Tule Canal year-round. Further, California Department of Water Resources' *Bulletin 250-2002 Fish Passage Improvement 2003* indicates that coldwater fish may become concentrated in the Tule Canal when there is insufficient flow to allow their passage through the Fremont Weir.

This new information directly conflicts with the State Board's stated rationale for modifying the ammonia limit and the Revised Order's Finding No. 10(g) statement that "Salmonids are known to be present in the Yolo Bypass from October to May." Consequently, the Regional Board should reopen and amend the Revised Order to consider the new information that coldwater species are present in every month of the year.

Permits may also be reopened and modified to correct mistakes. 40 CFR 122.62(a)(15). As discussed above, the State Board inadvertently eliminated ammonia standards protective of warmwater species. The Regional Board should correct this mistake.

Warm freshwater habitat, warm fish migration habitat and warm spawning habitat are identified beneficial uses of Tule Canal and must be protected. The Findings and Fact Sheets in the 2003 Order and the present Revised Order establish "Reasonable Potential" for ammonia. The Revised Order, as presently drafted, is not protective of salmonids and warmwater species and must be revised.

### **EC Limits Must be Included in the Revised Order**

The Revised Order also incorporates permit modifications made by the State Board, in WQO 2004-0010, that revised Regional Board Order No. R5-2003-0031 to eliminate an effluent limit for electrical conductivity (EC). Instead of a legally required effluent limit, the State Board only required the Discharger to conduct a study of the EC leaching impacts of floodwaters in the Yolo Bypass. Here again, subsequent new information justifies a reopening of the Revised Permit to include required EC limits.

Federal Regulations at 40 CFR 122.44(d) require effluent limitation in NPDES permits where the discharge causes or has the reasonable potential to cause or contribute to an in-stream excursion above a narrative criterion of the Basin Plan. In issuing Order No. R5-2003-0031, the Regional Board found a reasonable potential for concentrations of electrical conductivity (EC) in the discharge to exceed water quality objectives. The Revised Order also establishes reasonable potential.

The Discharger's effluent concentrations of EC range as high as 2,700  $\mu\text{mhos/cm}$  (average of 1,450  $\mu\text{mhos/cm}$ ). Effluent and downstream EC concentrations significantly exceed the agricultural water quality goal. Downstream EC concentrations are significantly higher than upstream EC concentrations. The Discharger's December 2,000



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study, titled *Recreation, Land Use, and Dilution Study of the Tule Canal and Toe Drain* confirms that water from the Tule Canal is used for crop irrigation.

Examination of recent self-monitoring data reveals that effluent concentrations in June 2005 were all above 1,600  $\mu$ mhos/cm. Additionally, more than a year after the State Board issued WQO 2004-0010, the Discharger has failed to develop a Regional Board approved study plan of EC impacts. Worsening water quality and the failure to develop an acceptable EC study justify reconsideration pursuant to 40 CFR 122.62(a)(2).

The EC effluent limit established by the 2003 Regional Board order was based on the Basin Plan's "Policy for Application of Water Quality Objectives. The 700  $\mu$ mhos/cm effluent limit to protect the agricultural beneficial use of the receiving water was derived from: 1) *Ayers R.S. and D.W. Wescott, Water Quality for Agriculture, Food and Agriculture Organization of the United Nations - Irrigation and Drainage Paper No. 29, Rev. 1, Rome (1985)* and 2) a University of California, Davis Campus, Agricultural Extension Service paper dated 7 January 1974.

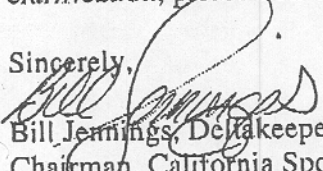
Additionally, the discharge substantially degrades the receiving water in violations of federal anti-degradation policy and State Board Resolution 68-16 ("Statement of Policy with Respect to Maintaining High Quality of Waters in California"). These policies require, among other things, that waste discharge requirements must result in best practicable treatment or control of the discharge necessary to assure that a condition of pollution or nuisance does not occur and that the highest water quality will be maintained.

We are unable to identify any regulation that is supportive of conducting a study in lieu of effluent limits where reasonable potential has been found. Regardless of the fact that the State Board adopted an illegal order, the Regional Board should not compound the problem by also adopting a permit that is contrary to statutory and regulatory requirements.

In conclusion, DeltaKeeper respectfully urges the Regional Board to include necessary effluent limits for beryllium, bis(2-ethylhexyl)phthalate and organochlorine pesticides in the Revised Order. We also urge the Board to, based upon new information, establish ammonia limits protective of both warmwater and coldwater species in Tule Canal and to rectify the State Board's illegal elimination of EC effluent limits in the Revised Order.

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact me at 209-464-5090.

Sincerely,

  
Bill Jennings, DeltaKeeper

Chairman, California Sportfishing Protection Alliance  
Vice President, Watershed Enforcers